INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	13
Conclusion	14

CITATIONS

Cases:	
United States v. *Paul J. Hooley*, No. —, O. T. 1953	13, 14
Statute:	
18 U. S. C. 401	2

290941—54——1

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 621

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD T. O'KEEFE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit reversing a conviction of the respondent for contempt of court based on the respondent's conduct before a grand jury.

OPINION BELOW

The opinion of the Court of Appeals (R. 79–81) is not yet reported. It should be read in connection with the opinions in the companion cases of *Carlson* v. *United States*, and *United States* v. *Hooley*. (See record O. T. 1953, No. —, pp. 150–161, 143–148.)

JURISDICTION

The judgment of the Court of Appeals was entered January 7, 1954 (R. 81). On February

5, 1954, Mr. Justice Frankfurter extended the time for filing a petition for certiorari to March 8, 1954 (R. 82). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a) F. R. Crim. P.

QUESTION PRESENTED

Whether answers of "I don't remember" made by the respondent to questions asked him by a grand jury were so obviously false that they can be treated as equivalent to refusals to answer, and therefore as misbehavior in the presence of the court within the meaning of 18 U. S. C. 401 (1).

STATUTE INVOLVED

18 U. S. C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT

The respondent, Donald T. O'Keefe, was one of a series of witnesses subpoenaed before a grand jury of the United States District Court

for the District of Massachusetts which, at the time, was investigating a widely-publicized robbery from the Brink's Company on January 17, 1950. On the basis of his answers to certain of its questions, the grand jury, on December 8, 1952, filed a presentment which charged that respondent "did wilfully, deliberately, and contumaciously, by evasion and irresponsive answers, obstruct the process of this Court, and did obstruct justice in failing and refusing to answer proper questions in the Grand Jury proceedings" (R. 5–6). A judgment of conviction, which was entered after a trial to the court, has been reversed by the Court of Appeals, and the presentment ordered dismissed (R. 81).

The facts, as developed at the trial, are as follows:

The examination of respondent, which took place on December 4 and 5, 1952 (R. 5), showed that he was a brother of one Joseph "Specs" O'Keefe, who was suspected of having had a major part in the Brink's robbery. The great bulk of the questions asked respondent seemed to be directed at discovering the extent and nature of his activities as a contact man between his brother, who was then in prison in Pennsylvania, and certain of his brother's friends in Boston (see, e. g., R. 10), particularly in connection with the raising of $3,000 to secure the release of the brother from prison. Respondent's grand jury testimony showed that he had made

about 15 weekend trips from Boston to the prison in a period of less than 18 months; and that these trips, which cost about $40 a piece, were made at his own expense, although his take home pay from his job as a sewer cleaner for the City of Boston was only about $56 per week. He was asked a number of questions about the subject matter of the conversations he had with his brother on these visits. His consistent and persistent reply to questions of this nature was that he did not remember.

The following are excerpts:

> Q. Did you say to your brother at that time, "I told him I was coming up, he didn't say anything, it was either Wednesday or Thursday night. I went and talked to the other guy and told him what I wanted, and the other guy said it was his headache." Did you say that to your brother Joseph? A. I don't recall saying it to him.
>
> Q. Will you say you didn't say it to him? A. I don't remember whether I did, or not.
>
> Q. If you did say it, who would you be referring to when you said, "I told him I was coming up"? Who would the "him" be? A. I don't remember any of the conversation.
>
> Q. Had you told somebody you were coming up to see your brother Joseph? A. Not that I recall, no.
>
> Q. What? A. I don't remember.

Q. Would there be any reason to say, if it wasn't so: "That he didn't say anything"? A. I don't remember any of the conversation I had with him. [R. 17.]

* * * * *

Did you tell your brother in April of 1952 that, "They were around to see you, your wife and other people you associate with"? A. I don't recall.

Q. Will you say that you didn't tell him that? A. I don't remember any of that conversation.

Q. Do you remember any conversation you had with him at any time you were down there? A. It's so long since I've been down there.

Q. That wasn't so long, that is only April of this year. A. I don't remember it. [R. 18.]

* * * * *

Q. And do you remember your brother Joseph telling you that he did not think he would make parole, which he thought was due to be acted upon by the 18th of March? A. I don't remember.

Q. Will you say that he didn't say to you? [sic] A. I don't remember.

Q. Did you have a talk with him about parole? A. I may have.

Q. Well, what was the talk? A. I don't remember what it was.

Q. Well, try and think for a minute and see if you can't help us out. A. (No response.)

Are you thinking? A. I don't remember the conversation.

Q. Well, that's what he was trying to do at that time, to get a parole. A. I imagine he was.

Q. You know that, when you talked to him. A. I guess——

Q. There's nothing wrong with him trying to get a parole. A. I don't think so.

Q. And you were his brother. A. That's right.

Q. And you were making trips down there to see him? A. That's right.

Q. And wouldn't it be natural for him to talk with you about getting the parole? A. I guess so.

Q. When you saw your brother, didn't he say to you he didn't think he'd make parole, which he thought would be due to be acted upon by the 18th of March? A. I don't remember what he said.

Q. Didn't he also say to you on that occasion, "If I don't make parole, I don't know whether to bust out of here or not."? A. I don't believe he ever said that.

Q. You don't. Will you say that he didn't say that? A. I don't recall him saying that.

Q. And that conversation in March—did your brother discuss various lawyers who had been retained to represent him and Gusciora, and who apparently hadn't been able to get very far? A. I don't recall any conversation.

Q. Will you say that he didn't—— A. I don't remember.

Q. Did he talk about any lawyer? A. I don't know.

Q. What do you mean, you don't know? A. Don't remember if he did or not.

Q. I see.

Do you remember your stating at the beginning of this examination that you wanted to be cooperative? A. That's right.

Q. Is that your idea of cooperation, what you are now giving us—that you don't remember what you and your brother talked about? A. I naturally don't remember. I don't remember what I talked about a month ago or two months ago or——

Mr. FEENEY. The substance—give us some idea.

The WITNESS. I don't recall.

Q. Did your brother Joseph say to you that he was sore because none of them had been down to see him? A. I don't recall.

Q. What? A. I don't recall.

Q. Will you say that he didn't say that? A. I don't remember if he did or not.

Q. In that same conversation, did your brother say to you, "There is no sense in your coming to see me; you can't answer my questions."? Did he say that to you? A. I don't recall.

Q. Will you say that he didn't? A. I don't remember.

Q. Did you say to him in that same conversation, "Yes, they don't tell me anything

about what is going on."? Did you say that to him? A. I don't recall.

Q. Will you say you didn't say it? A. I don't remember.

Q. You don't remember what you said? A. I don't remember.

Q. How far did you go in school. A. The eighth grade, grammar school.

Q. Do you have any trouble with your mental processes? A. I don't think so, not that I know of.

Q. Your memory supposed to be pretty good, is it? A. Well, it's average, I guess

Q. It wouldn't be average now, but ordinarily is it an average memory that you have? A. Well, I can't remember back three or four months.

Q. You can't. Did your brother Joseph say to you, in referring to the Boston contacts—the people in Boston who were supposed to be doing something for him—"If I ever get out of here, they will have so much trouble they won't know what to do."? Did your brother say that to you? A. I don't recall.

Q. Will you say that he didn't say it to you? A. I don't remember.

Q. I suppose you are wondering where I am getting this from, aren't you? A. No.

Q. If I were to tell you that those questions which I have asked were overheard while you were talking with your brother at the Bradford County Jail in Towanda, Pennsylvania, on March 8, between four

o'clock in the afternoon and 5:05, and again between 5:25 in the afternoon, at which time you returned with two steak dinners, and you remained in the jail with your brother until 6:15, would that help you to refresh your recollection as to what was said? A. No, I don't remember. [R. 19–22.]

* * * * *

You saw your brother again on June 7, 1951, prior to that, at the same jail, according to the records, arriving at 3:35 p. m. Was the substance of your brother's talk that he complained that he was not getting the proper attention from his friends in Boston? A. I don't remember.

Q. And that he was getting disgusted with them? A. I don't remember.

Q. Did Joseph tell you that on your return to Boston, you were to see them and inform them "exactly how I feel; that I am tired of being left alone; that I want quick action."? A. I don't recall him saying that.

Q. You don't? A. No.

Q. The substance of that, you recall him saying? A. I don't remember.

Q. Did your brother tell you to write down the address so you wouldn't forget it? A. I don't remember.

Q. Will you say he didn't say that to you? A. I don't remember whether he did or not.

Q. Do you remember anything that your brother has ever said to you, on any of

your visits that you have made out there to him? A. I couldn't recall any conversation I had with him.

Q. Could you recall the substance of any conversation that you had with him? A. No.

Q. Not a thing. Your mind is an absolute blank as to what your brother said, is that right? Is your mind an absolute blank as to what your brother said in the visits out to him there? A. No, but I don't remember any of the conversations I had with him. I just went there to see him, see how he was. [R. 27–28.]

Respondent was also asked about a conversation which he had with one Joe Gusciora. He conceded that he had not met Gusciora before the occasion of this conversation and that he initiated the meeting, but he could not recall what they talked about, except that the conversation concerned Gusciora's brother. Thus:

Q. But you come out to Stoughton, and you didn't know Joe Gusciora before you went out to see him, did you? A. I don't believe so.

Q. And you got out and telephoned to him, didn't you? A. Yes.

Q. When you telephoned to him, you made an appointment to meet him at the square in Stoughton, didn't you? A. I believe so, yes.

Q. You know so, don't you? Don't you know you did? A. Yes, I met him down the square there.

Q. Sure. And I suppose you said, "How are you, Joe?" A. I don't remember what I said.

Q. You didn't know Joe before he met you there, out there in Stoughton, did you? A. No.

* * * * *

Q. And so you don't know how long you rode with him when you went out there? A. No.

Q. What did you talk with him about? A. I don't remember what I talked to him about.

Q. You know he's testified in this Grand Jury? A. Yes.

Q. And he told about meeting you out there.

Did you go out there for the purpose of getting some money? A. No, I don't believe so.

Well, why do you say "I don't believe so"? A. I don't remember what I did go for.

Q. You weren't trying to get money, were you, to go—— A. No.

Q. So you didn't go out there for the purpose of trying to get any money.

Did you go out there to discuss the Brink's robbery with him? A. I don't believe so.

Q. Well, did you? A. I don't—I don't know what our conversation was.

Q. You don't remember what your conversation was with a man whom you had never met before, and you called for the

appointment? A. It was in regard to his brother.

Q. What was in regard to his brother? A. Any conversation.

Q. What was it? A. I don't remember what it was.

Q. What? A. I don't remember.

Q. You think you are going to get away with that answer? A. If I can't remember what the conversation actually was——

[R: 29–31.]

There were other occasions on which respondent asserted a failure of memory, but those given are illustrative.[1]

The presentment, and the reading of the respondent's testimony before the grand jury, was the Government's case (R. 58–59). Respondent thereupon moved the court to advise him as to which questions it thought he had contumaciously refused to answer, and to give him an opportunity, as to those to which it held that the constitutional privilege did not apply, to return to the grand jury room (R. 60, 59). This motion was apparently denied.

Respondent then attempted to testify in explanation of the answers he had made before the grand jury. On the court's refusal to permit this, respondent made what he called an offer to establish that his answers were in good faith (R. 67–68). The court, however, took the view

[1] In addition, respondent claimed the privilege against self-incrimination as to a number of subjects.

that the only issue was what was shown by the transcript, unless respondent intended to change his answers (R. 66), and excluded the offer of proof (R. 68).

The court thereupon announced its conclusions in the following terms (R. 70):

> I am, therefore, in the light of all the record, compelled to adjudge that you have been guilty of contempt and this judgment is based on the entire proceedings and I therefore impose a sentence of nine months * * *.

The Court of Appeals reversed the conviction, referring to its decision in *Hooley* v. *United States,* which it said was essentially the same.

REASONS FOR GRANTING THE WRIT

1. The issues presented here are the same as those presented and discussed in our Petition for a Writ of Certiorari in *United States* v. *Paul J. Hooley,* No. —, O. T. 1953, filed simultaneously herewith. The only problem, therefore, is whether on the face of the record the respondent's "I don't remember" answers were so clearly evasive that they were tantamount to refusals to answer at all.

We think that this case meets that test. It is true that a number of the questions asked respondent were so specific, as to date for example, that reasonable explanations could be made of the "I don't remember" answers, if these answers are taken out of context. But the testi-

mony as a whole, particularly in relation to respondent's assertion that he could not remember any of his conversations with his brother at the Towanda prison, nor even the substance of those conversations, makes it clear that the respondent simply did not choose to answer at all on that subject matter, and that he was in effect saying so. The same is true of respondent's testimony concerning his conversation with Joe Gusciora.

2. As we stated in our petition in the *Hooley* case, we do not now challenge the Court of Appeals' holdings (a) that respondent's claim of the privilege against self-incrimination does not amount to a completed contempt, and (b) that it was error to deny the respondent an opportunity to testify in his own behalf. This petition for a writ of certiorari is limited to challenging the Court of Appeals' ruling as to respondent's answers which claimed a failure of memory.

CONCLUSION

For the reasons stated, and as limited, it is respectfully submitted that the petition for a writ of certiorari be granted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH 1954.

U. S. GOVERNMENT PRINTING OFFICE, 1954